Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

The Lutheran Church/Missouri Synod	)	MM Docket No. 94-10
	)	
For Renewal of Licenses of Stations KFUO/KFUO-FM, Clayton, Missouri	)	File Nos. BR-890829VC BRH-890929VB

TO: Hon. Arthur Steinberg, Administrative Law Judge

REPLY TO OPPOSITION TO MOTION TO ENLARGE

The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively "NAACP"), by counsel, respectfully reply to the July 8, 1994 Opposition to Motion to Enlarge and Request for Injunctive Relief" filed by The Lutheran Church/Missouri Synod ("KFUO") as well as the Mass Media Bureau's "Comments on Motion to Enlarge and for Injunctive Relief" filed the same date.

I. Obtaining Work Product By Trick

The NAACP alleged that KFUO, through its lead witness and former General Manager, Tom Lauher, obtained by deception and trickery much of NAACP's entire trial strategy. Motion at 2.

The Court should reach the merits because the matter is decisionally significant even if two days out of time.1/ See 47 CFR §1.229(c).

The Motion demonstrated that Lauher led the NAACP's representative, Michael Blanton, and the undersigned counsel, to

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1/ KFUO's Opposition suggests that the two days of untimeliness made the Motion "grossly late." They add that that perhaps the motion could have been developed between June 1-12. The untimeliness was excusable. NAACP counsel was occupied far more than fulltime during the first three weeks of June preparing over 60 rebuttal exhibits. Thus, the NAACP had good cause for the de minimis delay. 47 CFR §1.229(b)(3).

(fn. 1 continued on p. 2)

believe that Lauher was willing to be interviewed by Blanton for the purpose of being an NAACP witness. Blanton and the undersigned counsel reasonably believed Lauher was levelling with them, because Lauher had written two memoranda highly critical of KFUO's EEO policies and had later been fired by KFUO.

1/ (continued from p. 1)

The length of time between the day the NAACP realized it had been cheated out of its trial strategy and the day it filed the Motion was not per se unreasonable. See Kansas City Power v. Pittsburg & Midway Coal Mining Co., 153 F.R.D. 171, 172 (D. Kansas 1989) ("Kansas City Power") (two week time between discovery of inadvertent disclosure and demand for application of privilege held to be "a reasonable amount of time.")

KFUO counsel -- after the fact -- speculate that if they had had the Motion earlier they wouldn't have read the Lauher's transcript of his interview with NAACP representative Michael Blanton. Opposition at 4 n. 2. But as shown infra, KFUO counsel already had Lauher's oral account of what happened. They either never saw fit to question Lauher on how he came to have such intimate information about the NAACP's strategy, or they knew but didn't care.

Furthermore, their actions after the Motion was filed hardly show an intent to mitigate any damage. Indeed, they refused to produce to NAACP counsel a copy of the Lauher transcript until after the trial was over. See Opinion 93-11 (Ohio Supreme Court Board of Commissioners on Grievances and Discipline, December 3, 1993) (while lawyer need not refrain from reading memorandum inadvertently disclosed to him, he does have an ethical duty to return a copy of the memo upon request). This nonproduction to the NAACP happened even though KFUO provided another party, the Bureau, with the Lauher transcript on request. Bureau Comments at 3 n. 2.

Indeed, KFUO counsel refused, out of spite, to follow simple norms of professional courtesy, such as refusing to provide NAACP counsel with a copy of Reed Miller's deposition, which the NAACP paid for, and which NAACP counsel needed to have while crossexamining Miller's associate, Marcia Cranberg. Tr. 914. This "win by any means" behavior, which also permeated KFUO counsel's handling of deposition witnesses and questions -- is far afield from the manner in which counsel should behave before an administrative agency. It is conduct "prejudicial to the administration of justice." D.C. Rules Prof. Conduct 8.4(d) (incorporating former DR-102(a)(5); see Comment 2).

Unbeknownst to Blanton, Lauher had signed on as a KFUO witness two days before his interview with Blanton.2/

KFUO asserts that although Lauher was KFUO's witness, he was not under its control. The circumstances belie that claim. Lauher voluntarily wrote his declaration himself and then worked closely

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2/ The Bureau quotes Blanton as telling Lauher that he could be called by any party, and infers that this means that the NAACP did not expect Lauher to be its witness. Bureau Comments at 4. However, Blanton's comments came at the end of the interview, by which time Blanton correctly discerned that Lauher would be useless to the NAACP as a witness. Indeed, Blanton's comment shows that Blanton did not know or suspect that Lauher had already been called as a witness by KFUO.

It is noteworthy that Lauher said nothing to disabuse Blanton of his obviously incorrect supposition that Lauher was, at that time, nobody's witness. Had Lauher not intended to deceive Blanton, Lauher would have corrected Blanton by disclosing that, indeed, he was already KFUO's witness.

Should Blanton have asked Lauher "by the way, are you already a witness for KFUO?" Blanton did not do that, and frankly, if undersigned counsel had been in his shoes, he wouldn't have done it either. Blanton and Lauher had already agreed that Lauher would be interviewed by Blanton for the purpose of being the NAACP's witness. Thus, the question would have been insulting and (assuming Lauher was genuine) could have caused him to freeze up and assume he was dealing with someone with whom he could not develop trust. An honest person hearing such a question would think that he was being suspected of being a spy.

Lauher was clearly going to be a key witness in the case. Thus, Blanton did the right thing by getting the ground rules straight before they met so they could have a frank, candid exchange when they met. Blanton was "negligent" only in his assumption that Lauher had been honest with him, an assumption which turned out to be unwarranted. But Blanton's assumption was reasonable at the time because he knew that Lauher (1) had written the two inculpatory EEO memos while he was KFUO General Manager; (2) had been fired by KFUO; and (3) as a broadcaster, was accustomed to dealing with the FCC and thus could be assumed to be completely forthcoming in matters relating to FCC proceedings.

Obviously, the NAACP now knows that Lauher is untrustworthy, but "[t]hrough hindsight one may conceive of further precautions that might have prevented an inadvertent disclosure. Under the circumstances in this case the precautions were reasonable." Kansas City Power, supra, 133 F.R.D. at 172. The NAACP should not be punished for trusting a dishonest witness.

with KFUO counsel to finalize it. KFUO counsel -- who were in St. Louis May 21 with Lauher -- had it typed and Lauher signed it. Tr. 73. Indeed, Lauher was the first witness who signed on to KFUO's direct case. Furthermore, on May 21, when he signed on, Lauher told KFUO counsel he was going to meet with the NAACP's representative. Gottfried Declaration (attached to Opposition) at 1. Later, although Lauher certainly knew he had deceived the NAACP and would likely be questioned about it, he appeared at trial without counsel of his own, apparently relying on KFUO counsel to defend his interests even if they differed from KFUO's interests. Finally, in his written and oral testimony, Lauher followed the KFUO line, distancing himself from the plain meaning of his two internal KFUO memoranda which were highly critical of KFUO's EEO compliance. Thus, the evidence is overwhelming that KFUO controlled Lauher.

KFUO counsel understandably wants this Court to believe that in his subsequent dealings with the NAACP, Lauher was merely a free agent, a loose cannon acting on his own, such that KFUO would have no responsibility for his actions. See Tr. 75 (KFUO counsel asserting that Lauher "decided on his own" to see the NAACP.) That is incredible. A neutral, third party witness, acting purely on his own, does not (1) agree to be interviewed by Party A to be its witness; (2) then sign on as the Party B's witness without telling Party A; (3) then be interviewed by Party A, tape recording the interview; (4) then physically transcribe the tape himself; and (5) then turn over the transcript to Party B.

KFUO's Opposition, at 3, also admits that KFUO counsel saw and read the transcript of Lauher's interview with Blanton the night before trial. KFUO's counsel also admit that Lauher briefed them on the Blanton interview after it happened and apparently well before trial, at a time when KFUO was contacting witnesses for scheduling purposes. Gottfried Declaration at 1; Tr. 74.3/

Thus, KFUO counsel had access the fruits of the Blanton interview well before trial, and apparently well before the NAACP's Motion to Enlarge was due. They should have known that the NAACP would never have asked questions of Lauher -- except in a deposition or with the benefit of his sworn testimony -- unless the NAACP thought that Lauher was on the NAACP's side.4/

KFUO counsel benefitted from having had the NAACP's trial strategy. This kind of information is extremely valuable in helping lawyers anticipate which questions their adversary will focus upon in crossexamination, and thus how to develop testimony and prepare the witnesses. Of course the NAACP did not have KFUO's trial strategy. Incredibly, KFUO finds nothing wrong with this. KFUO's counsel stated at the hearing that the Lauher transcript " "didn't reveal to me at all what the NAACP's theory was. I still don't know what the NAACP's theory of this case is." Tr. 75. In other words, she did not feel she had any obligation either not to

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3/ KFUO counsel admitted that Lauher told them he had had the interview with Blanton. Tr. 74. KFUO's Opposition does not say when this happened. See p. 6 infra.

4/ Bureau counsel also interviewed Lauher by telephone, but that happened on June 7, six days after Lauher's declaration was exchanged. Thus, unlike the NAACP, the Bureau knew that Lauher had taken sides and could guide itself accordingly.

read the transcript, or to disclose to NAACP counsel the fact that she had it. Her opinion was based on her self-serving impression of its contents.[5/] However, a reading of the transcript (attached to KFUO's Opposition) shows that the questions and answers were hardly trivial, and go to the key questions of (1) whether KFUO had been put on notice (by Lauher when he was General Manager) that it was violating the EEO Rule; (2) the role of former KFUO counsel Marcia Cranberg in suggesting that certain job requirements were BFOQ's; and (3) the extent to which records on hiring and recruitment had been maintained.

The fact that these were matters already known by KFUO to be at issue does not render harmless KFUO's invasion of the NAACP's privilege. Although dozens of matters were at issue in this case, KFUO -- thanks to Lauher -- knew exactly which ones the NAACP had focused upon. Such intelligence is highly sensitive in any trial.

It is true that the other KFUO witnesses (besides Lauher) testified that they had no access to the fruits of the Lauher interview. However, by KFUO's own admission, KFUO counsel did have access to some of that information, and they had it fairly early. For some reason, they do not say when they received Lauher's oral account of the interview. They knew when this happened, since they keep billing and telephone records. Conspicuously, they do not specifically state that they received this oral account after June 1, by which time the other KFUO witness' testimony (largely written

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5/ Yet even as KFUO counsel was saying that the Lauher transcript was valueless, they acted as though it had great value by refusing to provide it to the NAACP until after the trial was over. If it really were valueless, turning it over to the NAACP would have been a ministerial act.

by these same counsel) had been frozen.6/ Thus, KFUO counsel do not deny that their own thought processes were informed and mediated by what Lauher told them, and that Lauher's information played a part in their strategies as to what information to present through which witness and how to present it.7/

Finally, KFUO suggests that once the NAACP shared its questions with Lauher, those questions went into the public domain and ceased to be confidential. Opposition at 7. The NAACP could hardly have suspected or intended any such extreme result. In interviewing a person who one reasonably believes has agreed to be one's witness -- indeed, the key witness -- one necessarily must embed many one's confidential impressions about the case in the questions asked. It is impossible to segregate these impressions from the interview questions.

It is the client's right to the privilege which deserve protection. Mendenhall v. Barber-Greene Co., 531 F.Supp. 951, 955 (N.D. Ill. 1982) (no waiver where counsel inadvertently produces

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6/ Lauher signed his trial testimony on May 21, on which date he told KFUO counsel he was meeting with the NAACP. He had that meeting on May 23. Logically, he would have been expected to report back to his handlers immediately about such an interesting matter. In the absense of an express KFUO representation that Lauher inexplicably waited over a week to make this report to KFUO counsel, the Court must assume that Lauher made his report promptly. See McCormick on Evidence §2272 (1984) ("if a party has it peculiarly in its power to produce witnesses whose testimony would eludicate the transaction, the fact that it does not do it creates the presumption that the testimony, if produced, would be unfavorable"), quoted in Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev. Bd.), recon denied, 3 FCC Rcd 5631 (Rev. Bd. 1988), affirmed, 5 FCC Rcd 5561 (1990).

7/ Even if Lauher reported to them about his NAACP interview after June 1, though, KFUO counsel still had an unfair advantage in that they could anticipate NAACP crossexamination and thus better prepare their witnesses.

documents); see also Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F.Supp. 936, 938 (S.D. Florida 1991); Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955) (to the same effect). The privilege does not die simply because a witness has seen the privileged material. See Hodges, Grant & Kaufmann v. U.S. Government, 768 F.2d 719, 721 (5th Cir. 1985) ("[t]he privilege is not, however, waived if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication); Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 679 (S.D.N.Y. 1983) ("[t]he mere fact that a deposition witness looked at a document protected by the attorney-client privilege in preparation for a deposition is an an inadequate reason to conclude that the privilege was destroyed.")

Thus, the question KFUO counsel should have asked themselves when they came onto this suspiciously obtained, highly detailed information, was whether the Missouri, St. Louis and St. Louis County NAACP units could possibly have consented to having this kind of sensitive material find its way into their hands.8/ Lauher's deception in signing on with KFUO and then interviewing with the NAACP was known to KFUO's counsel at that point (if not much earlier). They should have borne in mind that "deception...may nullify a waiver." S.E.C. v. Forma, 117 F.R.D.

8/ In Federal Deposit Ins. Corp. v. Ernst & Whinney, 137 F.R.D. 14, 17 (E.D. Tenn. 1991), the Court outlined five factors a court should consider when determining whether the attorney client privilege had been waived because of inadvertent disclosure:

(n. 8 continued on p. 9)

516, 523 (S.D.N.Y. 1987) ("Forma").9/

The question of whether the fruits of the Lauher/Blanton interview were privileged isn't completely determinative of this Motion, however. Even nonprivileged communications by litigants are surrounded by a penumbra of confidentiality. Thus, independent of privilege questions, it is unfair for one side to have an advantage over the other because it obtains the other side's trial strategy. See ABA Formal Opinion 92-368 (1992) ("a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should (1) refrain from examining the materials,

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8/ (continued from p. 8)

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure[;]

(2) the number of inadvertent disclosures;

(3) the extent of disclosures;

(4) any delay and measures taken to rectify the disclosures; and

(5) whether the overriding interest of justice would or would not be served by relieving a party of its error.

In all five respects, the NAACP acted reasonably. Blanton and Lauher had agreed that Lauher was being interviewed to be the NAACP's witness. Blanton had no reason to doubt that Lauher was sincere about this. The NAACP took these precautions with all witnesses; and since all but Lauher were candid about their bonafides, Lauher was the only NAACP interviewee through whom privileged matter found its way into KFUO's hands. The NAACP acted with reasonable speed to protest, doing so before the first witness took the stand. And justice is on the side of preserving the privilege, since no party would place its trial strategy in the public domain.

9/ The alleged deception in Forma happened to have been attributable to the government, but the underlying evidentiary principle is equally applicable when private parties are responsible for the deception.

(2) notify the sending lawyer and (3) abide the instructions of the lawyer who sent them" (emphasis supplied)).

KFUO's counsel's actions are attributable to KFUO. See Carol Sue Bowman, 6 FCC Rcd 4723 (1991). Accordingly, the requested issue should be tried.

II. Witness Interference

The NAACP alleged (1) that KFUO knew that Rev. Otis Woodard would be a key witness, and (2) that KFUO therefore sought to influence Woodard's testimony, first with a carrot and then with a stick.

The Bureau has this one right:

> there exists a close question which is likely to be illuminated by the Church's explanation. In the absence of a reasonable explanation by the Church, the Bureau would not oppose addition of an abuse of process issue to inquire into the alleged attempt to influence Woodard's testimony.

Bureau Comments at 9.

The heart of KFUO's explanation is that Dennis Stortz did not "know" whether Woodard had given the NAACP a declaration, because Woodard did not tell him he had done so or (as was the case at on the morning of June 15 when they spoke) might imminently do so. That explanation is fatuous. When the June 15 contacts between Stortz and Woodard occurred, the NAACP's trial exhibits were due in two days. Stortz well knew that. Thus, his feeble attempt to appear innocent of knowledge of "what time it was" in the course of trial preparations strains credulity.10/ What else would the NAACP have been talking to Woodard about other than giving the NAACP a

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10/ Stortz was KFUO's General Manager. He essentially coordinated KFUO's trial preparations.

declaration? Did Stortz think the NAACP was making courtesy calls on key witnesses two days before its exhibits were due?

Stortz' offer of PSAs to Woodard was very unusual. KFUO states that Woodard had appeared on KFUO previously, but KFUO does not state that it had ever aired his organization's PSAs.11/

Furthermore, KFUO knew that Woodard was vulnerable to influence as a person who had long sought employment at KFUO.

Woodard's and Stortz' declarations on the thrust of this conversation are diametrically opposed. Woodard says Stortz "also inferred the possibility of work or a job in the future" while Stortz said that Woodard initiated the discussion of this matter and that Stortz was noncommittal. These differences in testimony are decisionally significant. Here, a witness genuinely and appropriately desirous of PSA time or employment was being led to think that he might receive these things -- two days before the NAACP exhibit exchange date.12/

Only discovery can resolve the decisionally significant differences between the Stortz and Woodard accounts. The question of which account is true presents a "substantial and material question of fact" which requires a hearing. Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 394 (D.C. Cir. 1985); see California Public Broadcasting Forum v. FCC, 752 F.2d 657 (D.C. Cir. 1985).

11/ See McCormick on Evidence §2272, supra.

12/ The obverse inference also applies: Woodard had to assume that if he signed on with the NAACP, KFUO would look with disfavor on his attempts to secure employment or PSA time.

Accordingly, the NAACP's Motion to Enlarge should be granted.

Respectfully submitted,

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July 25, 1994

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 25th day of July, 1994, caused a copy of the foregoing "Reply to Opposition to Motion to Enlarge" to be delivered, by hand, to the following:

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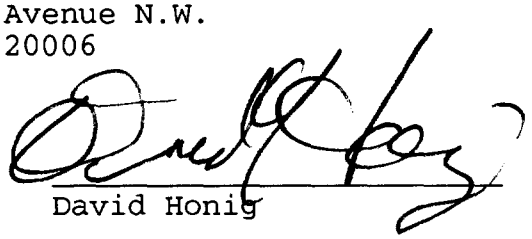

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